THE JURISDICTION OF ATHENIAN ARBITRATORS

By Robert J. Bonner

The earlier writers on Greek legal antiquities insisted strongly upon a comparatively limited jurisdiction for the public arbitrators. Disregarding to some extent the scanty and often obscure notices of the lexicographers, they examined with great care the extant speeches, seizing upon every bit of evidence that seemed to support the view that arbitration was not always compulsory in private suits. So convincing were the arguments of Hudtwalcker[1] and Meier[2] that their leading opponents were won over to their view and thus the matter stood until Hubert and Lipsius[3] insisted upon giving due weight to the testimony of the lexicographers and turned the balance in favor of compulsory arbitration for nearly all private suits. This view was apparently so strongly confirmed by Aristotle (*Ath. Const.* 53) that it has won universal acceptance. My reason for reopening a question thus satisfactorily settled is the conviction that the statement of Lipsius,[4] "dass die öffentlichen Diäteten für Privatprocesse die unerlässliche erste Instanz bildeten," is too sweeping.

Aristotle, after discussing the cases that came within the jurisdiction of the Eleven, the εἰσαγωγεῖς and the ἀποδέκται, continues with a description of the duties of the Forty πρὸς οὓς τὰς ἄλλας δίκας λαγχάνουσιν. This body decided all cases under ten drachmas; other cases were handed to the arbitrators. If there was an appeal from their award the case was referred back to the Forty and by them brought to trial. The words τὰς ἄλλας δίκας are taken to mean that all private suits except those previously mentioned came within the jurisdiction of the arbitrators;[5] and

[1] *Ueber die öffentlichen und Privatschiedsrichter in Athen*, 1812.

[2] *Die Privatschiedsrichter und öffentliche Diäteten Athens*, 1846.

[3] Lipsius, *Attische Process*[2] (1887), pp. 1009 ff.; Hubert *De arbitris Atticis et privatis et publicis* (1885), p. 38.

[4] *Ber. d. säch. Gesellsch. d. Wiss.* (1891), p. 58. This has been repeated in similar form by all subsequent writers.

[5] Lipsius *op. cit.*, p. 57; cf. Sandys' note on Arist. *Ath. Const.* 53. 1.

so far as the Greek is concerned this is the natural interpretation of the words. But the difficulty encountered in attempting to reconcile this interpretation with Aristotle's subsequent statements is practically unsurmountable. He nowhere mentions the arbitrators apart from the Forty. These two groups of legal officers are so closely linked together that, as Pischinger[1] rightly insists, cases could go to the arbitrators only through the Forty. Indeed Aristotle says very distinctly that the cases of resident aliens went from the polemarch to the arbitrators through the Forty. We should expect the same practice to be followed by other magistrates. Lipsius[2] believes that each magistrate sent his cases directly to the proper arbitrator without the intervention of the Forty. This view, however, finds no support in Aristotle. Suits originating with the archon or the thesmothetae would have to go through an intolerably cumbersome procedure. This in itself is enough to arouse suspicion. For example, a case is entered before the archon; he holds an *ἀνάκρισις* and sends it to the Forty. From them it goes to the proper arbitrator and thence, in case of appeal, back to the Forty or the archon. For here we find conflicting statements in Aristotle. In one place we are told that appeals from an arbitrator's award went to the Forty, who took them into court;[3] in another that the archon took his own cases into court.[4] To escape this contradiction, Pischinger resorts to the doubtful expedient of denying the accuracy of Aristotle. Relying on Harpocration he holds that all cases which came to the arbitrators were referred back on appeal to the magistrates who first received them. But the words *καὶ σημηνάμενοι* (sc. *οἱ διαιτηταὶ*) *παρεδίδοσαν τοῖς εἰσαγωγεῦσι τῶν δικῶν* are too indefinite to support an impeachment of the testimony of Aristotle; *τοῖς εἰσαγωγεῦσι* may refer as well to the Forty as to the original magistrates in the various cases.[5] But apart from this Harpocration is as usual

[1] *De arbitris Atheniensium* (1893), p. 39. [2] *Attisches Recht* (1905), p. 227.

[3] *Ath. Const.* 53. 1. ff.: *κληροῦσι δὲ καὶ τετταράκοντα . . . . πρὸς οὓς τὰς ἄλλας δίκας λαγχάνουσιν· . . . . καὶ τὰ μὲν μεχρὶ δέκα δραχμῶν αὐτοτελεῖς εἰσι κρίνειν, τὰ δ' ὑπὲρ τοῦτο τὸ τίμημα τοῖς διαιτηταῖς παραδιδόασιν, ... παραδιδόασιν* (*οἱ διαιτηταὶ*—in case of an appeal) *τοῖς τέτταρσι . . . . οἱ δὲ παραλαβόντες εἰσάγουσιν εἰς τὸ δικαστήριον.*

[4] *Ibid.* 56. 6: *γραφαὶ δὲ καὶ δίκαι λαγχάνονται πρὸς αὐτόν* (i. e., the archon), *ἃς ἀνακρίνας εἰς τὸ δικαστήριον εἰσάγει.*

[5] Cf. Lipsius *Attisches Recht*, p. 227, n. 30.

following Aristotle and is evidently of the opinion that he is simply reporting, not correcting, him, for he adds, *λέγει δὲ περὶ αὐτῶν* (sc. *τῶν διαιτητῶν*) *Ἀρ. ἐν Ἀθ. πολ.*

In describing the legal duties of the chief magistrates Aristotle (58. 2) has nothing to say about arbitration, except in cases involving resident aliens, which the polemarch sent to the Forty. The case then follows the regular course of suits originating before the Forty. Occasionally his language is such as to preclude the possibility of arbitration in the regular cases within the jurisdiction of these magistrates. Speaking of the archon he says: *γραφαὶ δὲ καὶ δίκαι λαγχάνονται πρὸς αὐτόν, ἃς ἀνακρίνας εἰς τὸ δικαστήριον εἰσάγει.* Why does he pass over without a word the important process the case went through between the *ἀνάκρισις* and the trial, if there was indeed an arbitration? Pischinger[1] has observed this difficulty, and complains of Aristotle's carelessness; but his explanation that *ἀνακρίνας* refers to *γραφαί* only and not to *δίκαι* serves only to emphasize his appreciation of a difficulty which calls for such heroic treatment. Similarly we find Demosthenes passing immediately from the archon's *ἀνάκρισις* to the trial: *καὶ μετὰ ταῦθ' ὁ ἄρχων ἀνέκρινε πᾶσιν ἡμῖν τοῖς ἀμφισβητοῦσι, καὶ ἀνακρίνας εἰσήγαγεν εἰς τὸ δικαστήριον.*[2] In one case the situation is practically unintelligible if arbitration intervened. The plaintiff in *Callistratus* v. *Olympiodorus*[3] in his account of litigation in which he and his present opponent had sought to establish their claims to the estate of a deceased relative, says that after the *ἀνάκρισις* before the archon they found themselves totally unprepared to go to trial and cast about for some excuse for delay to enable them to prepare the case for the jury. Their excuses, however, were not accepted and the case went against them by default. Now if they had arranged their case sufficiently to enable them to produce all their evidence and arguments before an arbitrator, the preparation of the case for trial would not have been formidable enough to justify their risking the loss of the

[1] *Op. cit.*, p. 34, n. 3: "hanc totam materiam Aristoteles minore cura aut scientia tractavit."

[2] Dem. 48. 31, cf. Dem. 43. 7–8.

[3] Dem. 48. 23. *καὶ ἐπειδὴ ἀνεκρίθησαν πρὸς τῷ ἄρχοντι ἅπασαι αἱ ἀμφισβητήσεις καὶ ἔδει ἀγωνίζεσθαι ἐν τῷ δικαστηρίῳ, ἀπαράσκευοι ἦμεν τὸ παράπαν πρὸς τὸ ἤδη ἀγωνίζεσθαι.*

suit by default in order to get more time to prepare an address for the jury.

But in any event the theory that *τὰς ἄλλας δίκας* include all the remaining private suits proves too much. For no one, I fancy, is prepared to believe that *αἱ τοῦ φόνου δίκαι* (57. 2) were subject to arbitration. How could an arbitrator settle a murder case? And yet these cases must be included equally with those that were within the jurisdiction of the other archons. If, however, they be excepted the whole case so far as Aristotle is concerned falls to the ground. Evidently Aristotle has used *τὰς ἄλλας δίκας* loosely. All the difficulties above mentioned disappear, if we understand him to mean that all private suits not otherwise assigned in his treatise belong to the Forty and that these cases alone were subject to arbitration.

It is extremely doubtful if anyone would have tried to read this view into Aristotle had it not been for the evidence of the extant speeches.[1] In the Orators a number of arbitration cases appear which have long been regarded as falling within the jurisdiction of the archon and the thesmothetae. I give here Pischinger's list of these cases.[2]

I. Archontis actiones. (1) *ἐπιτροπῆς*: Lys. 32; Dem. 27; 29. (2) *κλήρου*: Dem. 43. 31. (3) Status familiae: Dem. 40. 10.

II. Thesmothetarum actiones. (1) *κλόπης*: Dem. 22. 27, 28. (2) Status civitatis: Lys. 23; Isaeus 12; (Dem.) 59, 60.

It is worth while to examine carefully the adequacy of the evidence relied upon by Pischinger in constructing this list. It has been observed[3] that in none of the so-called inheritance cases (*κλήρου*), which are comparatively numerous, is there any mention of arbitration.[4] The argument *ex silentio* is materially strengthened by the peculiar situation that occurs in *Callistratus* v. *Olympiodorus* already discussed. On two occasions[5] litigants

[1] Pischinger *op. cit.*, p. 34: "non enim pagorum iudices soli, sed etiam alii magistratus arbitris causas instruendas tradebant, id quod ex orationibus Demosthenis satis intellegitur."

[2] *Op. cit.*, p. 35.

[3] Hubert *op. cit.*, p. 38.

[4] The affidavit inserted in Dem. 43. 31 is discussed below.

[5] Isaeus 8. 42: *καὶ ταῦτα ὅτι ἀληθῆ λέγω, δεδίασι μὲν αὐτόν, ἴσως δ' ἄν μοι καὶ μαρτυρῆσαι ἐθελήσειαν· εἰ δὲ μή, τοὺς εἰδότας παρέξομαι μάρτυρας. καί μοι κάλει δεῦρο αὐτοὺς πρῶτον.* Isaeus 9. 18: *ὅμως μέντοι καὶ κάλει Ἱεροκλέα, ἵνα ἐναντίον τούτων μαρτυρήσῃ ἢ ἐξομόσηται.*

in inheritance cases introduce new evidence on the day of trial, and in two other inheritance cases it is manifest that the speakers did not know what affidavits would be produced by their opponents. In *Chaerestratus* v. *Androcles* the plaintiff says: *οὐ γὰρ ἂν εἴπῃ μητρὸς ὄνομα, γνήσιοί εἰσιν, ἀλλ' ἐὰν ἐπιδεικνύῃ ὡς ἀληθῆ λέγει, τοὺς συγγενεῖς ⟨μάρτυρας⟩ παρεχόμενος τοὺς εἰδότας.*[1] To the same effect are the words of the speaker in another case of Isaeus:[2] *ὥστε ἂν ἐπὶ τοῦτον τὸν λόγον καταφεύγῃ καὶ μάρτυρας παρέχηται ὡς διέθετο.* Had these cases come through the hands of an arbitrator neither of these situations could have arisen, for it was the uniform practice of the arbitrators to reduce to writing all the evidence produced before them and to seal it up. If the case was appealed, practically no new evidence was allowed.[3]

An attempt has been made to save the rule forbidding the introduction of new evidence by assuming that when a witness did not appear at the arbitration, an unacknowledged affidavit was nevertheless filed.[4] But no one has been able, so far as I have observed, to cite any authority for this theory. Indeed, it is even contrary to the express statement of a client of Demosthenes, the plaintiff in *Apollodorus* v. *Timotheus*, who says:[5] *τοῦ μὲν γὰρ μαρτυρίαν με ἐμβαλέσθαι πρὸς τὸν διαιτητὴν παρεκρούσατο, φάσκων ἀεί μοι μαρτυρήσειν εἰς τὴν κυρίαν [ἀπόφασιν]. ἐπειδὴ δ' ἡ δίαιτα ἦν, προσκληθεὶς ἀπὸ τῆς οἰκίας (οὐ γὰρ ἦν φανερός), ἔλιπε τὴν μαρτυρίαν.* Moreover, this assumption fails entirely to explain how a litigant could be ignorant of any part of the evidentiary apparatus of his opponent, for all documents filed at the arbitration were certainly accessible to both parties. If, however, there was no arbitration, it is easy to understand how new evidence could be introduced without the previous knowledge of an opponent. For, as I have elsewhere shown, the rule requiring the arbitrator to close the case did not apply to the *ἀνάκρισις* in non-arbitration cases,[6] and new evidence was permitted at the trial.

[1] Isaeus 6. 64. [2] Isaeus 10. 23; cf. 9. 9.

[3] For a discussion of several regular exceptions see the writer's *Evidence in Athenian Courts* (1905), p. 55. They do not include, however, evidence of the kind introduced in the cases under discussion.

[4] Kennedy in *Dic. of Antiq. s.* "martyria." [5] Dem. 49. 19.

[6] *Evidence in Athenian Courts*, pp. 48 ff.; Thalheim (*Berl. phil. Woch.* XXV [1905], col. 1575), takes exception to several of my minor arguments in this connection, but

This consideration is materially strengthened by the fact that in no case that indisputably came before an arbitrator is there any attempt to introduce new evidence or any sure indication that the speaker is not fully aware of the evidence he has to meet. Pischinger and Hubert[1] have misgivings in classifying inheritance cases as arbitration suits, but are convinced by the mention of arbitration in an affidavit of doubtful authenticity inserted in *Eubulides* v. *Macartatus*.[2] The facts are briefly as follows: The estate of one Hagnias was claimed by a young man, whose mother Phylomache had at first been triumphantly adjudged in court heiress of the estate but in subsequent litigation had been defeated by the father of Macartatus, the defendent in the present suit.[3] Now the plaintiff Eubulides gives a detailed account of this litigation and calls for evidence to prove that his mother won the first suit. But the affidavit that we find inserted at this point proves only that she won her case before the arbitrator.[4] And as a public arbitration was not final the affidavit proves absolutely nothing. It is as if a modern lawyer should attempt to prove to a jury that his client had been finally aquitted of a charge of murder by producing the verdict of a coroner's jury in his favor, instead of the verdict of a criminal court of last resort. It is idle to attempt to escape the difficulty by asserting that since Phylomache's victory was not in dispute this affidavit served the purpose well enough.[5] Something is wrong, for the affidavit does not prove what an affidavit introduced at this point should prove; but the question of its genuineness is beyond the scope of this paper.[6] I merely submit that in view of the suspicions[7] that this document has always aroused it cannot properly be cited as the

practically admits my contention when he proposes to extend *ἀνάκρισις* so as to include the activity of the magistrate right up to the moment of trial, for it is to be presumed that this would include documents deposited with him even on the day of trial. Of these an opponent would not likely have any knowledge.

[1] Pischinger *op. cit.*, p. 35; Hubert *op. cit.*, p. 38. [2] Dem. 43. 31. [3] Dem. 43. 4 ff.

[4] *μαρτυροῦσι παρεῖναι πρὸς τῷ διαιτητῇ ἐπὶ Νικοφήμου ἄρχοντος, ὅτε ἐνίκησε Φυλομάχη ἡ Εὐβουλίδου θυγάτηρ τοῦ κλήρου τοῦ Ἀγνίου τοὺς ἀμφισβητοῦντας αὐτῇ πάντας.* Dem. 43. 31.

[5] Drerup *Jahrbücher f. class. Phil.* XXIV (1889), p. 325.

[6] Blass suggests *δικαστηρίῳ*, instead of *διαιτητῇ*.

[7] Pischinger *op. cit.*, p. 35.

sole proof that inheritance cases came before an arbitrator, especially against strong evidence to the contrary, drawn from the speeches themselves.

The so-called guardianship suits (ἐπιτροπῆς)[1] constitute an important class of arbitration cases which have always been regarded as coming within the archon's jurisdiction. But neither in the Diogeiton case, nor in Demosthenes' suits to recover his patrimony, including the three speeches against Aphobus and the two against Onetor, is there any indication that the archon had charge of the litigation. In *Aphobus* v. *Phanus*[2] Demosthenes enumerates the various phases of the litigation before arbitrators both private and public and before the jury. Had there been an ἀνάκρισις before the archon we should expect the proceedings to be mentioned here, as they are, for example, in nearly all the inheritance suits referred to in the Orators.[3] In *Demosthenes* v. *Onetor*[4] the plaintiff goes into details about dates and says that he brought the suit against his guardians "in the archonship of Timocrates," ἐπὶ τοῦ αὐτοῦ ἄρχοντος. Had it been possible it would have been more effective to say "before the archon Timocrates," πρὸς τὸν αὐτὸν ἄρχοντα. It is true that Lipsius[5] sees in a passage in this speech a reference to the archon as the presiding officer. Demosthenes is arguing that Onetor cannot plead that he was an "innocent" mortgagee of the property of Aphobus, because he must have been well aware of Aphobus' mismanagement of the property of Demosthenes and the consequent liability of his entire estate to execution in case of a successful suit. He says that the embezzlement of his guardians was so well known from the very first that everybody was confident that he would

[1] Lysias 32; Dem. 27; 28; 29; 30; 31. For a complete list, see Schultess *Vormundschaft nach attischem Recht* (1886), pp. 244 ff. There is no mention of the archon in any of these suits.

[2] Dem. 29, 30 ff.

[3] Cf. *Theopompus et al.* v. *Phylomache; Eubulides* v. *Macartatus;* Dem. 43. 8, 15; *Leochares* v. *Aristodemus*, Dem. 44. 1: *Callistratus* v. *Olympiodorus*, Dem. 48. 23, 31; *The Nephews of Dicaeogenes* v. *Leochares*, and *Chaerestus* v. *Androcles*, Isaeus 5.18; 6.12.

[4] Dem. 30. 15.

[5] *Attische Process*, p. 58, n. 46.

surely institute successful legal proceedings against them on attaining his majority. The passage is as follows:

ἐγὼ γὰρ ὦ ἄνδρες δικασταὶ πολλοὺς τ' ἄλλους Ἀθηναίων καὶ τοῦτον οὐκ ἐλάνθανον κακῶς ἐπιτροπευόμενος, ἀλλ' ἦν καταφανὴς εὐθὺς ἀδικούμενος· τοσαῦται πραγματεῖαι καὶ λόγοι καὶ παρὰ τῷ ἄρχοντι καὶ παρὰ τοῖς ἄλλοις ἐγίγνονθ' ὑπὲρ τῶν ἐμῶν. τό τε γὰρ πλῆθος τῶν καταλειφθέντων ἦν φανερόν, ὅτι τ' ἀμίσθωτον τὸν οἶκον ἐποίουν οἱ διαχειρίζοντες ἵν' αὐτοὶ τὰ χρήματα καρποῖντο, οὐκ ἄδηλον ἦν. ὥστ' ἐκ τῶν γιγνομένων οὐκ ἔσθ' ὅστις οὐχ ἡγεῖτο τῶν εἰδότων δίκην με λήψεσθαι παρ' αὐτῶν, ἐπειδὴ τάχιστ' ἀνὴρ εἶναι δοκιμασθείην.—Dem. 30. 6.

Dareste, Beauchet,[1] and others see in this passage evidence of official interference by the archon and other officials (*παρὰ τοῖς ἄλλοις*), but have difficulty in explaining who the other officials were. It is of course not impossible that proceedings before the archon were instituted during the minority of Demosthenes in an attempt to force his guardians to do their duty. But it is somewhat improbable. For it is difficult to understand how the archon could have taken any sort of official action without curing such gross irregularities as were afterward proved to the satisfaction of the jury.[2] And if we suppose with Lipsius that it refers to the archon's *ἀνάκρισις*, we lose the whole point of the passage, which lies in the fact that the *πραγματεῖαι* and *λόγοι* belong to a period much earlier than the termination of the guardianship and the institution of the final legal proceedings. For after the *ἀνάκρισις* it would be impossible to say:

ὥστ' ἐκ τῶν γιγνομένων οὐκ ἔσθ' ὅστις οὐχ ἡγεῖτο τῶν εἰδότων δίκην με λήψεσθαι παρ' αὐτῶν, ἐπειδὴ τάχιστ' ἀνὴρ εἶναι δοκιμασθείην.—Dem. 30. 6.

For the *ἀνάκρισις* could not be held until Demosthenes had attained his majority. Schäfer[3] is probably right in paraphrasing thus: "Umsonst war das Stadtgespräch bis zu dem Archonten gedrungen." The case was so notorious that it was common gossip everywhere, even in the highest quarters. Moreover, in Aristotle's account of the archon's duties, we find no mention of a *δίκη ἐπιτροπῆς*, nor any general statement of jurisdiction that includes it. The whole passage so bristles with details that it would seem to be fairly

[1] *Histoire du droit privé des Athéniens* II, p. 273.

[2] Aphobus was fined ten talents (Dem. 29. 60). Such irregularities as the retention of the widow's dower and the failure to rent the house could surely have been rectified.

[3] *Demosthenes und seine Zeit* I, p. 270.

exhaustive, and in any event, none of the suits mentioned could be instituted during the minority of a ward.[1] The evidence of the lexicographers[2] is valueless in comparison with Aristotle. Pollux, who is most explicit, does speak of a δίκη ἐπιτροπῆς ὀρφανῶν, but he is merely reproducing Aristotle without the details and includes under this single head Aristotle's (δίκη) εἰς ἐπιτροπῆς κατάστασιν and (δίκη) εἰς ἐπιτροπῆς διαδικασίαν.[3] So, too, the δίκαι ὀρφανῶν of Photius and Harpocration cannot include more than the suits specified by Aristotle. The consideration that the archon is after all the proper official to deal with litigation involving guardian and ward is of little weight, since the δίκη ἐπιτροπῆς was really only a special kind of damage suit which could not be instituted until the wardship was terminated.[4]

Another case cited by Pischinger is *Boeotus et al.* v. *Mantias*, which is referred to in *Mantitheus* v. *Boeotus*.[5] It is a suit brought by two young men to compel their putative father to recognize them as his legitimate sons. The case was settled in favor of the plaintiffs before an arbitrator by an evidentiary oath of the mother. As it does not belong to any of the classes of suits mentioned by Aristotle as coming before the archon, and there is no mention of the archon in the notice of the suit, we have no valid reason for regarding it as falling within his jurisdiction.

One of the arbitration suits mentioned by Pischinger is an appeal from the decision of the deme denying the plaintiff's citizenship.[6] It has always been a matter of surprise that a case involving so serious a penalty as slavery should have been subject to arbitration, particularly when an Attic deme was the defendant. Nevertheless Schömann's[7] view that such cases were treated as private suits has been generally accepted. But Aristotle's[8] reference to these suits shows conclusively that they were regarded as

[1] Beauchet *op. cit.* II, p. 280.

[2] This evidence is conveniently collected in Sandys' edition of Aristotle's *Ath. Const.*, p. 206.

[3] *Ath. Const.* 56. 6.

[4] Beauchet *op. cit.* II, p. 303.

[5] Dem. 40. 9 ff.

[6] Isaeus 12. 11.

[7] On Isaeus, p. 478.

[8] Arist. *Ath. Const.* 59. 4. Lipsius *Attisches Recht*, p. 70, failing to observe the significance of this passage, still adheres to Schömann's view.

public. After enumerating the *γραφαί* which came before the thesmothetae, he adds:

εἰσάγουσιν δὲ καὶ τὰς δοκιμασίας ταῖς ἀρχαῖς ἁπάσαις, καὶ τοὺς ἀποψηφισμένους ὑπὸ τῶν δημοτῶν, καὶ τὰς καταγνώσεις τὰς ἐκ τῆς βουλῆς. εἰσάγουσι δὲ καὶ δίκας ἰδίας, κ. τ. λ.

Some difficulty is involved in the appearance of an arbitrator in a public suit, and no more satisfactory explanation can be offered than that of Wyse.[1]

I conjecture that, when a general revision of the roll of citizens was ordered, special measures were taken in order to assist the thesmothetae in dealing with the sudden increase of their work. Thus, while the summons probably was, as usual, before the thesmothetae, these magistrates might have been empowered by the decree ordering the revision to commit the preparation of the case to a public arbitrator, instead of conducting the examination (*ἀνάκρισις*) themselves and managing all the preliminaries of a trial.

Wyse further remarks that "no weight can be laid on the absence of any notice of an arbitration in *Euxitheus* v. *Eubulides*." It is true, however, that the proposal in this case to introduce new evidence[2] at the trial is incompatible with a regular arbitration. If an arbitrator did intervene he must have acted in some such exceptional manner as Wyse supposes, else new evidence could not have been introduced.

The plaintiff in *Phrastor* v. the members of his phratry, which is cited in *Theomnestes* v. *Neaera*,[3] proposed to introduce his son into his phratry. On their refusal to accept him he entered an action against the members of his phratry. Being challenged to swear before the arbitrator that the boy's mother was a citizen regularly wedded to himself, he refused and dropped the case. Here again internal evidence is lacking that the case came before the thesmothetae, though in three[4] other suits mentioned in this speech the thesmothetae are specifically referred to as having charge of the litigation. One cannot but wonder why he does not

[1] On Isaeus (*Or.* 12), p. 716.

[2] Dem. 57. 14. *συμβαίνει δέ μοι περὶ τούτων τῶν μὲν φίλων ἢ τῶν ἄλλων Ἀθηναίων μηδένα μάρτυρα παρεῖναι, διά τε τὴν ὥραν καὶ διὰ τὸ μηδένα παρακαλέσαι, αὐτοῖς δὲ τοῖς ἠδικηκόσι με χρῆσθαι μάρτυσιν. ἃ οὖν οὐ δυνήσονται ἔξαρνοι γενέσθαι, ταῦτα γέγραφ' αὐτοῖς.*

[3] Dem. 59. 60.

[4] Dem. 59. 16, 52, 66.

here also mention the thesmothetae. Neither does the case belong to those in which a man is ejected by a deme—*τοὺς ἀποφισμένους ὑπὸ τῶν δημοτῶν*. It is quite another matter. A mere child is refused admittance to a phratry, not to a deme, and his father brings the action. Besides, the present case is a private suit, while the other is public.[2]

In *Euctemon* and *Diodorus* v. *Androtion* one of the plaintiffs, in discussing the various means of redress that lie open to an aggrieved person,[3] mentions larceny as a crime that may be dealt with in four distinct ways. One of these is a civil action (*δίκη κλόπης*) which was subject to arbitration. But nothing is said about the magistrate who would preside at the trial in this kind of case. Meier and Schömann[4] suggest, without giving any reason for their view that it belongs to the thesmothetae.

Similarly I am at a loss to know why Pischinger regards the suit against Pancleon[5] as an arbitration case or why he assigns it to the thesmothetae, for there is no reference to arbitration in any part of the speech. Neither are the thesmothetae mentioned. It is true that some have erroneously regarded *τοὺς τῇ Ἱπποθωντίδι δικάζοντας* as arbitrators, but Lipsius[6] rightly regards these as the Forty.

At this point a brief summary of my position may be helpful. *τὰς ἄλλας δίκας* cannot include all suits subsequently mentioned by Aristotle, because—

1. The language of both Aristotle and Demosthenes is incompatible with the intervening of arbitration between the archon's *ἀνάκρισις* and the trial.

2. Aristotle would be involved in a contradiction, for, while he says in one place that the arbitrators acted only in conjunction with the Forty who introduced arbitrated cases into court if there

[1] Aristotle *Ath. Const.* 59. 4. It is unlikely that Apollodorus, the speaker, carelessly uses *δίκη* for *γραφή*, because we are told that he was well versed in the law (Dem. 59. 15).

[2] Dem. 22. 27, 28.

[3] *Att. Process*, p. 453: "Die Behörde, vor welche diese Klage gehört, war bei der Dike und Graphe *warscheinlich* das Collegium der Thesmotheten, bei den andern Klagformen aber gewiss die Elfmänner."

[4] Lysias 23. 2; cf. Schuckburg's note on this passage.

[5] *Att. Process*, p. 90, n. 143.

was an appeal, he elsewhere says that the archon himself introduced into court all cases within his own jurisdiction.

3. Too much is proved. We should be obliged to regard the δίκαι φόνου as arbitration cases—a manifest absurdity.

4. It cannot be satisfactorily shown that a single arbitration case mentioned in the Orators belonged to the jurisdiction either of the archon or of the thesmothetae. Two of the cases regarded by Pischinger as arbitration suits did not in fact come under the jurisdiction of the arbitrators. A third is a public suit in which an arbitrator could not appear in his ordinary capacity. In the remaining five cases there is no internal evidence to connect them with any particular magistrate. External evidence also is lacking. Clearly the *onus probandi* is upon those who undertake to determine what magistrate had charge of these cases. As yet no satisfactory proof has been offered.

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